

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DURRWIN and SANDRA LANKFORD,
individually and on behalf of
all others similarly situated,

NO. CIV. S 05-1147 MCE PAN

Plaintiffs,

v.

MEMORANDUM AND ORDER

BILTBEST PRODUCTS, INC., a
Delaware corporation; BILTBEST
OF CALIFORNIA, INC., a
Delaware corporation; BILTBEST
WINDOWS, an unknown business
entity; BILTBEST WINDOWS AND
PATIO DOORS, an unknown
business entity; MW
MANUFACTURERS, INC., a
Delaware corporation; MW
MANUFACTURERS HOLDING CORP., a
Delaware corporation; U.S.
INDUSTRIES, INC., an unknown
business entity; and DOES 1-
100, inclusive,

Defendants.

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Through the present class action suit, Durrwin and Sandra
Lankford ("Plaintiffs") allege that Biltbest Products, Inc.,

1 Biltbest of California, Inc., Biltbest Windows, Biltbest Windows
2 and Patio Doors, MW Manufacturers, Inc., MW Manufacturers Holding
3 Corp., and U.S. Industries, Inc. (collectively, "Defendants") are
4 strictly liable for damages they suffered as the result of
5 defective windows installed in their home. Plaintiffs filed
6 their First Amended Complaint in the Superior Court of California
7 in and for the County of Sacramento on April 14, 2005. Biltbest
8 of California, Inc. ("Biltbest") filed its Notice of Removal to
9 this Court based on diversity jurisdiction on June 8, 2005. On
10 July 7, 2005, Plaintiffs filed a motion for remand on the ground
11 that defendants failed to demonstrate the requisite amount in
12 controversy necessary for diversity jurisdiction. For the
13 reasons set forth below, Plaintiffs' motion for remand is
14 denied.¹

15 16 **BACKGROUND**

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18 This suit, brought by California homeowners, involves
19 alleged design defects in aluminum windows and sliding glass
20 doors manufactured and installed by Defendants. The Plaintiffs
21 named thus far are residents of the City of Elk Grove, in
22 Sacramento County, who purchased mass-produced, single-family
23 homes that contained Defendants' windows and sliding glass doors.
24 On February 14, 2005, Plaintiffs filed claims in the superior
25 court for strict products liability, breach of implied warranty
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27 ¹Because oral argument will not be of material assistance,
28 the Court orders this matter submitted on the briefs. E.D. Cal.
Local Rule 78-230(h).

1 of fitness, breach of implied warranty of merchantability, breach
2 of express warranty and negligence.

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4 **STANDARD**

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6 A defendant may remove any civil action from state court to
7 federal district court if the district court has original
8 jurisdiction over the matter. 28 U.S.C. § 1441(a). Generally,
9 district courts have original jurisdiction over civil actions in
10 two instances: (1) where there is complete diversity between the
11 parties, or (2) where a federal question is presented in an
12 action arising under the Constitution, federal law, or treaty.
13 28 U.S.C. §§ 1331 and 1332.

14 The removing party bears the burden of establishing federal
15 jurisdiction. Ethridge v. Harbor House Rest., 861 F.2d 1389,
16 1393 (9th Cir. 1988). Furthermore, courts construe the removal
17 statute strictly against removal. Shamrock Oil & Gas Corp. v.
18 Sheets, 313 U.S. 100, 108 (1941); Gaus v. Miles, Inc., 980 F.2d
19 564, 566 (9th Cir. 1992) (citations omitted). If there is any
20 doubt as to the right of removal in the first instance, remand
21 must be granted. See Gaus, 980 F.2d at 566. Therefore, if it
22 appears before final judgment that a district court lacks subject
23 matter jurisdiction, the case shall be remanded to state court.
24 28 U.S.C. § 1447(c).

25 Any civil action may be removed to federal district court so
26 long as original jurisdiction would lie in the court to which the
27 case is removed. 28 U.S.C. § 1441(a). Jurisdiction founded on
28 28 U.S.C. § 1332 requires that the parties be in complete

1 diversity and the amount in controversy exceed \$75,000. Matheson
2 v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir.
3 2003).

4 If the district court determines that removal was improper,
5 then the court may also award the plaintiff costs and attorney
6 fees accrued in response to the defendant's removal. 28 U.S.C. §
7 1447(c). The court has broad discretion to award costs and fees
8 whenever it finds that removal was wrong as a matter of law.

9 Balcorta v. Twentieth-Century Fox Film Corp., 208 F.3d 1102, 1106
10 n.6 (9th Cir. 2000).

11 12 ANALYSIS

13
14 As noted above, Defendants bear the burden of establishing
15 federal jurisdiction. Where diversity is the ground for federal
16 jurisdiction, the district court shall have original jurisdiction
17 of all civil actions where the matter in controversy exceeds the
18 sum or value of \$75,000, and is between the citizens of different
19 states. See 28 U.S.C. § 1332(a)(1).

20 The Parties concede that this matter is between the citizens
21 of different States. The salient issue raised by this motion is
22 whether Defendants have satisfactorily demonstrated that the
23 value of the matter in controversy exceeds \$75,000.

24 25 Amount in Controversy

26
27 When jurisdiction is founded on diversity, the removing
28 party bears the burden of showing that the amount in controversy

1 exceeds \$75,000. Matheson, 319 F.3d at 1090-1091. In cases
2 where a plaintiff's state court complaint does not specify a
3 particular amount of damages, the removing defendant bears the
4 burden of establishing, by a preponderance of the evidence, that
5 the amount in controversy exceeds \$75,000. See Sanchez v.
6 Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996).
7 Under this burden, the defendant must provide evidence
8 establishing that it is more likely than not that the amount in
9 controversy exceeds \$75,000. Id. (internal citations and
10 quotations omitted.) Defendants may rely upon facts presented in
11 the removal petition as well as any summary judgement type
12 evidence relevant to the amount in controversy at the time of
13 removal. See Matheson, 319 F.3d at 1090-1091.

14 Plaintiffs first offer to stipulate to a damage claim of
15 less than \$75,000 as a means of defeating diversity jurisdiction.
16 Defendants correctly note that the amount in controversy for
17 determining federal jurisdiction must be determined from the
18 pleadings as they exist at the time a petition for removal is
19 filed. Eagle v. Am. Tel. & Tel. Co., 769 F.2d 541, 545 (9th Cir.
20 1985). Consequently, Plaintiffs' offer to stipulate is
21 irrelevant to ascertaining the propriety of federal jurisdiction.

22 Defendants aver that the amount in controversy is met
23 because Plaintiffs are praying for actual damages, the removal
24 and replacement of all defective windows and sliding glass doors,
25 expert costs, the cost of investigation, and attorney's fees
26 pursuant to section 1021.5 of the California Code of Civil
27 Procedure. Pl.s' First Am. Compl., P. 12. Plaintiffs rebut that
28 neither the expert costs, the cost of investigation nor

1 attorney's fees may be considered when calculating the amount in
2 controversy.

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4 **a. Expert Costs and Costs of Investigation**

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6 Both Parties concede, and this Court agrees, that the actual
7 cost of repairing and replacing defective windows and doors may
8 be considered in calculating the amount in controversy.²
9 Conversely, the Parties dispute whether investigation and expert
10 costs are properly included in the amount in controversy
11 calculation. Plaintiffs point to 28 U.S.C. § 1332(b) which
12 provides that the amount in controversy is determined without
13 regard to the costs of suit. The question, however, becomes
14 whether the cost of investigation and retaining an expert is to
15 be considered a "cost of suit" or whether it is a measure of
16 damage.

17 When defining what constitutes a "cost of suit" versus a
18

19 ²Defendants assert that each home has between twelve and
20 eighteen windows that would require sizeable expense to repair
21 and replace. Specifically, Defendants would be required to
22 perform the following tasks to repair and replace any defective
23 windows: Demolition of exterior stucco system around each window
24 up to 12" around the window; the stucco system and water proof
25 barrier, including the building paper, must be removed up to 12"
26 around the window; the window product itself must be removed from
27 the wood frame; the building structure, including the wood frame
28 at the window opening, must be inspected and any resultant damage
from the allege leaking window product must be repaired; the wood
frame window opening must be prepared to accept the new window'
the new window, if not the precise measurement of the removed
window, would require either enlarging or shrinking of the
existing wood frame opening; the new window must be installed;
new water proof barrier must be installed and reintegrated with
the existing water proof system around the window; a new stucco
system must be installed around the window; and the exterior of
the home must be repainted lest the new paint around the windows
not match the remainder of the home.

1 measure of damage, the Court must consider whether to apply state
2 or federal law. It is well established that state law controls
3 the substance of a diversity lawsuit, but federal law controls
4 the procedure by which the district court oversees that
5 litigation. See Hanna v. Plumer, 380 U.S. 460, 473, 14 L. Ed. 2d
6 8, 85 S. Ct. 1136 (1965). A state law authorizing costs of any
7 kind as an element of damages creates a substantive right in
8 diversity actions. Clausen v. M/V New Carissa, 339 F.3d 1049,
9 1065 (9th Cir. 2003). Accordingly, California substantive law
10 dictates what costs are to be considered damage for purposes of
11 calculating the amount in controversy.

12 Pursuant to section 1033.5(b) of the California Code of
13 Civil Procedure, fees of experts not ordered by the court and the
14 cost of investigation in preparing a case for trial are not
15 allowable as costs for purposes of awarding a prevailing party
16 its costs. While this alone does not establish that they should
17 be considered damage, it does clarify that they are not allowable
18 as costs for certain purposes. With respect to construction
19 defect cases, at least one California court has held that expert
20 costs are a part of the damage rather than the cost of suit. See
21 Stearman v. Centex Homes, 78 Cal. App. 4th 611 (Cal. Ct. App.
22 2000). Specifically, the court reasoned that, "[i]t would be
23 proper to view this \$250,000 expert expense as damages due for a
24 portion of the cost of repair, which is an appropriate measure of
25 damages in cases based on damage to real property." Id. at 624.

26 In sum, the Court finds that the cost of investigation as
27 well as expert costs are properly considered a part of the damage
28 to Plaintiffs rather than the cost of suit and, therefore,

1 properly considered in calculating the amount in controversy for
2 purposes of diversity jurisdiction.

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4 **b. Attorney's Fees**

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6 Plaintiffs argue that attorney's fees should not be
7 considered in evaluating whether the amount in controversy has
8 been satisfied. Defendants urge precisely the opposite.

9 As an initial matter, 28 U.S.C. § 1332(b) does permit
10 consideration of attorney's fees in the amount in controversy
11 analysis if they are recoverable by statute or contract. Here,
12 Plaintiffs are seeking to recover at least part of their
13 attorney's fees pursuant to section 1021.5 of the California Code
14 of Civil Procedure. Pl.s' Compl., P. 12. While Plaintiffs are
15 clearly seeking to recover some part of their attorney's fees
16 pursuant to statute, the whole of that amount cannot be
17 attributed solely to them for purposes of calculating the amount
18 in controversy. In fact, the Ninth Circuit has held that
19 "...attorney's fees are not awarded solely to the named
20 plaintiffs in a class action, and that they therefore cannot be
21 allocated solely to those plaintiffs for purposes of amount in
22 controversy. Gibson v. Chrysler Corp., 261 F.3d 927, 942 (9th
23 Cir. 2001). Accordingly, only the share attributable to
24 Plaintiffs themselves may be considered in assessing the amount
25 in controversy.

26 Even considering only a small allocation of attorney's fees
27 to Plaintiffs, the Court finds that the actual cost of repairing
28 and replacing twelve (12) to eighteen (18) windows and doors in

1 Plaintiffs' home together with the expert costs and the
2 investigative costs is more likely than not sufficient to satisfy
3 the \$75,000 jurisdictional amount.

4
5 **CONCLUSION**
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7 The Court finds that Plaintiffs are completely diverse in
8 citizenship from Defendants and the minimum amount in controversy
9 is met. Accordingly, jurisdiction properly lies in this Court.
10 Plaintiffs' motion to remand this case to the state court is
11 DENIED and Plaintiffs shall bear their own costs for seeking
12 remand of this action.

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14 IT IS SO ORDERED.

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16 DATED: October 20, 2005

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20 MORRISON C. ENGLAND, JR.
21 UNITED STATES DISTRICT JUDGE
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